

1 **MARY SCHULTZ**
2 **MARY SCHULTZ LAW, P.S.**
3 2111 E. Red Barn Lane
4 Spangle, WA 99031
5 Tel: (509) 245-3522
6 Fax: (509) 245-3308
7 E-mail: Mary@MSchultz.com

The Hon. Stanley Bastian

8
9 **Attorney for Plaintiff**

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON**

STEVEN HONKUS,

Plaintiff,

v.

TRIMBLE NAVIGATION, LTD.,

Defendant.

NO. 2:16-CV-00312-SAB

**RESPONSIVE COUNTER
MOTION
IN LIMINE –**

**EXPERT REPORT OF
MATTHEW MEDLIN**

**Date: May 17, 2018
Time: 10:00 a.m.
Spokane**

With Oral Argument

Plaintiff Steven Honkus, through counsel, Mary Schultz of Mary Schultz Law, P.S., files this responsive countermotion in limine to defendant Trimble Navigation's motion in limine filed at *ECF 47*.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. Responsive Counter-Motion.

Trimble's motion, filed at ECF 47, and set for hearing on May 17, 2018 at 10:00 a.m., seeks to exclude Mr. Honkus' expert witnesses Dr. Stephen Diamond and Dr. Thomas Selling. Mr. Honkus will timely respond to that motion by responsive memorandum; however, as an initial part of his response, Mr. Honkus submits this responsive countermotion in keeping with the court's text order regarding the timely filing of Daubert motions. *ECF 25*. Mr. Honkus will argue *against* the exclusion of expert testimony in response to Trimble's motion. But as summarized herein, Trimble's motion, if granted, would require similar exclusion of Trimble's expert, Matthew Medlin.

II. Basis.

The SOX whistleblower statute, 18 U.S.C.A. § 1514A, prohibits Trimble, as a publically traded company, from discharging, threatening or harassing, or in any other manner discriminating against Mr. Honkus in the terms and conditions of his employment because of any lawful act done by him:

“(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or

1 1348, or any rule or regulation of the Securities and Exchange Commission, or
2 any provision of Federal law relating to fraud against shareholders,

3
4 18 U.S.C.A. § 1514A.

5 To establish the elements of his claim, Mr. Honkus must therefore
6 establish his belief that what he was reporting was Trimble's violation of either
7 a SOX statutory section, or, more generically, "any rule or regulation of the
8 Securities and Exchange Commission, or any provision of Federal law relating
9 to fraud against shareholders," *Id.* He must also establish that this belief
10 was reasonable. In order to trigger the protections of the Act, an employee
11 must have "(1) a subjective belief that the conduct being reported violated a
12 listed law, and (2) this belief must be objectively reasonable." *Van Asdale v.*
13 *Int'l Game Tech.*, 577 F.3d 989, 1000-01 (9th Cir. 2009), *quote source omitted.*

14
15
16
17 This "related to fraud" requirement is not something delivered to a jury
18 through a jury instruction. Indeed, an employee "need not cite a code section
19 he believes was violated" to trigger the protections of § 1514A. Instead, if the
20 employee's statements to supervisors report conduct that definitively and
21 specifically related to shareholder fraud, then "[T]hat is all that § 1514A
22 requires." *Van Asdale*, 577 F.3d at 997. What thus constitutes something that
23 subjectively and objectively "definitively and specifically relates to shareholder
24
25
26

1 fraud” is at issue. What objectively, definitively, and specifically relates to
2 shareholder fraud within the SOX regulatory scheme is a complex issue.
3
4 This is where expertise comes in. What companies and employees should
5 know regarding what relates to shareholder fraud are generally not learned by
6 studying explicit statutes, but through company compliance procedures, and,
7 often, on the job osmosis. *Dec. of Schultz, Ex. C, Dorr Deposition at pp. 11-*
8 *12; 56* (a sales manager who came to an understanding over the course of his
9 years of employment of what regulatory controls exists as to publically
10 traded companies, and came to understand that intentionally misrepresenting
11 financial performance would violate regulatory requirements); but then
12 compare *Schultz, Ex. B, Controller Lu Shi Deposition* (Trimble’s TCL
13 business controller, who testifies that she doesn’t know whether it is “against
14 the law” to consistently and knowingly inflate forecasts).

15
16 Indeed, even beyond the employee’s subjective belief, the employee
17 must also show that Trimble supervisors, here, e.g., general managers,
18 executive vice presidents, business controllers, and the corporate CFO, would
19 and/or should have known that what Mr. Honkus was reporting was conduct
20 that could reasonably have been considered illegal under the regulatory
21 scheme. That is, Mr. Honkus “also must establish that ‘[t]he named person
22
23
24
25
26

1 knew or suspected, actually or constructively, that the employee engaged in the
2 protected activity.” *Id.* at 1002, citing to 29 C.F.R. § 1980.104(b)(1)(ii).

3
4 Defendant Trimble has seized on this subjective/objective requirement.
5 Trimble’s defense, in part, is this:

6
7 “1. That Plaintiff was not engaged in protected activity under state or
8 federal law.”

9 *ECF 17, Affirmative Defenses at p.11.*

10
11 Trimble’s defense thus asserts that it is not reasonable for Mr. Honkus to
12 believe that his business unit’s inflating earnings at the business unit level was,
13 or would not be, reasonably related to shareholder fraud, (and thus protected
14 activity), and that such business behavior is not objectively related to
15 shareholder fraud. To refute that defense requires an understanding of exactly
16 what business practices *relate* to shareholder fraud, what employees should
17 reasonably believe relates to fraud, and what corporations are necessarily
18 tasked to implement as compliance procedures to prevent fraud, including what
19 business behavior “flags” or communicates such illegality. The Court will thus
20 hear about business practices, such as the requisite “internal controls” and
21 “internal audits,” both of which are business structures that ensure regulatory
22 compliance. These practices are why, e.g. executive vice presidents of sales
23
24
25
26

1 are not sent to investigate a business unit's relentless inflating of its forecasts—
2 such a process would be knowingly bogus. Internal audit, and auditors are what
3 are used within such companies to address repeated financial anomalies. But a
4 jury will not know this absent hearing of the industry regulatory compliance
5 practices.
6

7
8 As will be explained in Mr. Honkus' upcoming response to Trimble's
9 motion, regulatory compliance consists of business practices and internal
10 compliance processes that "relate to" shareholder fraud, and therefore the very
11 definition of protected activity is encompassed within those same practices.¹
12 Similarly, whether Trimble management would have known that Mr. Honkus'
13 reporting flagged *compliance* mandates requires the same expert testimony. It
14 is, as an example, untenable for a business controller to think that inflating
15 forecasts is just a matter of "corporate culture." *See Exhibit B, Shi*. As attested
16 by sales employee Dorr, limitations on such behavior are known by employees
17

18
19
20 ¹ See, e.g., "Corporate Compliance Programs," which "ensure compliance
21 with the requirements of the Sarbanes-Oxley Act... as regards the handling of
22 employee complaints." See, e.g., *Business Transactions Solutions* § 223:78,
23 *April 2018 Update, Alan S. Gutterman, Part IX. Governance and*
24 *Compliance, Chapter 223. Compliance Programs, Forms.*
25
26

1 in reporting companies to implicate illegality. *See Exhibit C, Dorr.*

2 Here, Trimble executives and others could readily and self-servingly
3 claim whatever they like about Trimble's corporate compliance, as does, e.g.,
4 Ms. Shi. Trimble higher management executives could testify they had no
5 idea that a business unit inflating its forecasts would be a compliance
6 concern, and falsely assert that forecasting is objectively *not* a concern as a
7 matter of business compliance. Witnesses could mislead a jury on how
8 compliance is allegedly done within corporations or not done. Such self-
9 serving testimony from executive corporate witnesses such as a CFO or even
10 a general manager cannot be effectively shown to be false by Mr. Honkus or
11 his lawyer arguing with the witness. This is where expert testimony comes
12 in.
13

14 Expert evidence thus provides a necessary understanding of how public
15 companies structure, implement, and perform their compliance obligations
16 under federal securities law, and, thereby, what management would, or should,
17 understand as a matter of course and compliance upon being presented with
18 Mr. Honkus' reporting. The testimony allows Mr. Honkus to establish the
19 elements of his claim, and to show the falsity of the defenses offered by
20 Trimble.
21
22
23
24
25
26

1 Here, Trimble's own defense expert Matt Medlin discusses some of
2 these intricacies of Trimble's intended defense. Mr. Medlin proposes to testify,
3
4 e.g.:

5 1) That a reasonable lower level employee of a publically traded
6 company should allegedly know about company-wide sales forecasting:
7

8 "Opinion 1 – Mr. Honkus should have known TCL's
9 sales forecast misses were not meaningful in
10 comparison to Trimble's actual sales.

11 Opinion 2 – Mr. Honkus should have known TCL's
12 sales forecast misses were not meaningful in
13 comparison to Trimble's forward-looking sales
14 guidance.

15 Opinion 3 – Mr. Honkus should have known Trimble's
16 actual sales were, more often than not, in or above the
17 range of forward-looking sales guidance;"

18 2) That Trimble business unit TCL's "missed sales forecasts" were
19 not "material" given the entirety of the company's reporting, and that certain
20 accounting standards don't apply to Trimble:

21 "Opinion 4 - The Selling Report improperly applies
22 SAB 99, SAS 107 and AS 2105 and then
23 inappropriately ignores key elements of these
24 statements; if applicable, these three statements would
25 cause a reasonable business person to conclude that
26 the TCL sales forecast misses were not material;"

27 3) That a reasonable employee of a publically traded company
28 should know about the various SEC compliance forms, and what is and is not

1 allegedly included in such reporting:

2 “Opinion 5 - Mr. Honkus should have known TCL's
3 sales forecast was not a component of annual or
4 quarterly financial statements filed with the SEC in
5 Forms 10-K or 10-Q;” and,

6 4) That a regulatory exception known as “Safe Harbor” applies to
7 forward looking sales guidance:

8 “Opinion 6 - Mr. Honkus should have known the
9 forward-looking sales guidance provided by Trimble to
10 the public was covered by the Safe Harbor provisions of
11 the Private Securities Litigation Reform Act of 1995.”

12 *Ex. A, Medlin report, pp. 3-4, “Summary of Opinions,” ¶ 12.*

13 Such defenses require that the jury be given some understanding of why
14 these are disingenuous defenses in the field of SOX regulation.

15
16 **III. Conclusion.**

17 Mr. Honkus will timely submit argument on why the exclusion of expert
18 testimony under such circumstances is error. This present counter-motion to
19 exclude Mr. Medlin’s report and his testimony is filed only for the purpose of
20 ensuring that, were the Court to (erroneously) grant any exclusion order, then
21 Defendant’s SOX expert, Matthew Medlin, must also be excluded.
22
23
24
25
26

1
2 DATED this 20th day of April, 2018.
3

4 MARY SCHULTZ LAW, P.S.,

5 /s/Mary Schultz

6 WSBA #14198

7 Attorney for Plaintiff

8 **Mary Schultz Law, P.S.**

9 2111 E. Red Barn Lane, Spangle, Washington 99031

10 Tel: (509) 245-3522/Fax: (509) 245-3308

11 E-mail: Mary@MSchultz.com
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

DATED this 20th day of April, 2018.

E-mail: Mary@MSchultz.com